

**Since the claimant complied with the employer's expectation not to call and ask that clients be taken to her new hair salon location, she did not engage in misconduct. She may not be disqualified under G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0025 5123 44**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from her position with the employer on April 27, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 7, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 28, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to give the employer an opportunity to testify and present other evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where, following remand, the findings indicate the claimant complied with the employer's directive regarding communication with the claimant's former clients.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked variable part-time hours (usually 19-20 hours per week) as a non-union Hairdresser for this employer's chain of hair salons beginning on 10/01/08. The employer services customers at assisted living facilities.
2. The claimant's income was based on commission sales of 50% and gratuities with a usual biweekly payment of \$900.00 - \$1,400.00.
3. On 02/28/18, the claimant's supervisor, the Salon Manager, told the claimant that she had received a complaint that a customer had been billed for services during a period of hospitalization. The claimant at that time explained that because she had been working alone during the weeks at issue and was very busy she had forgotten to note the correct date of the service and had entered the service date later, but the claimant assured her supervisor that the service had in fact been done. The supervisor told the claimant that in the future, even if busy, she must enter the date of service correctly prior to billing. The claimant agreed to do this moving forward.
4. After that February 2018 incident, the claimant's supervisor began to personally lose trust in the claimant. A few weeks later, the claimant's supervisor saw the claimant eating a boxed lunch that had been prepared for an event at the facility. The claimant at the time told the supervisor that there were many boxed lunches and the one she had taken would not be missed by anyone. The supervisor made no comment to the claimant about her taking one of the lunches for herself, but this incident also caused the supervisor to personally lose trust in the claimant.
5. The claimant had worked in one salon location for most of her employment but had recently been relocated to another employer location in the same area. Unbeknownst to the claimant, the supervisor wanted the claimant at a location where she would no longer be working alone because of the personal trust issues the supervisor had regarding the claimant.
6. When the claimant was moved to the new location in March of 2018, the claimant asked if her long-term customers could be notified so they could follow the claimant to the new salon location. The claimant's supervisor specifically authorized the claimant to contact these clients and have them follow the claimant to her new location for her services.
7. On 04/20/18, her supervisor told the claimant, for the first time, that she should not contact the Receptionist to encourage Aids [sic] to escort customers to her new location. After 04/20/18, the claimant never contacted the Receptionist for this purpose again.
8. On 04/27/18, the Head Nurse complained to the claimant's supervisor that the claimant had been calling the Receptionist to encourage Aides to bring customers to her new location if they wanted service from the claimant. The

Head Nurse was upset because she did not want the Aides leaving the floors for this purpose.

9. On 04/27/18, the claimant was discharged by her supervisor via telephone.
10. On 04/27/18, the claimant's supervisor discharged the claimant because she personally no longer felt she could trust the claimant. The claimant's supervisor mistakenly believed that the claimant had continued to call the floor Receptionist seeking customers after 04/20/18 after the supervisor had directed her not to make such calls. The claimant had not done this after 04/20/18.
11. On 04/27/18, when the claimant received the telephone call terminating her employment, the claimant was not given any reason for the discharge. The claimant was told only "this is not going to work". The claimant asked for the reason for her discharge but was told nothing.
12. The claimant filed a claim for unemployment benefits on 04/30/18 effective 04/29/18.
13. The claimant requested a hearing on the initial 07/07/18 determination that the claimant had allegedly been discharged for a work rule or policy violation.

#### Credibility Assessment:

The claimant's testimony regarding her good faith efforts to follow the work directives she was given while working for this employer was accepted by this review examiner as credible. At the Remand hearing, the claimant's supervisor explained that the final incident that triggered the discharge on 04/27/18 was a complaint from the Head Nurse that the claimant had called the receptionist to encourage Aids [sic] on the resident floors to bring customers to her new location if the customers wanted services from the claimant. The Head Nurse was upset because she did not want the Aids [sic] to be leaving the units for that purpose. The claimant was never questioned about the final incident and had no opportunity to offer any defense to the employer's concerns prior to her termination on 04/27/18. The claimant believes the Head Nurse's complaint was in reference to incidents prior to 04/20/18 when she had been first told not to contact receptionists for assistance in having Aids [sic] bring customers for services. Had the claimant been questioned by her supervisor about the final incident, she would have explained this to her supervisor. The employer supervisor on 04/27/18 had personally lost trust in the claimant and was not interested in hearing any defense the claimant might offer, even though a compelling defense existed.

#### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). On the record before us, the employer has failed to meet its evidentiary burden.

After hearing the employer's testimony during the remand hearing, the review examiner found that, on April 20, 2018, the claimant was warned not to contact the receptionist at her prior employer worksite to request that aides at that site transport the residents to the claimant's new location, so that the claimant could provide salon services. The review examiner found that the head nurse at the claimant's prior worksite complained to the supervisor after April 20<sup>th</sup> that the aides were leaving the floor in order to take the residents to the claimant's new location. Based on the head nurse's complaint, the claimant's supervisor believed that the claimant had failed to comply with the directive given to her on April 20<sup>th</sup>. However, the review examiner found that, after speaking with her supervisor on April 20<sup>th</sup>, the claimant had ceased to request that aides transport residents to her new location, thus complying with the employer's expectation. Thus, the employer has failed to establish that the claimant engaged in the misconduct for which she was fired.

We, therefore, conclude as a matter of law that the claimant's discharge on April 27<sup>th</sup> was not attributable to deliberate misconduct in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning April 29, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 24, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SVL/rh